No. 96

In the Supreme Court of the United States

OCTOBER TERM, 1958

DAVIDSON TRANSFER & STORAGE COMPANY, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. 1a–9a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1958. The petition for a writ of certiorari was filed on June 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether in a suit by a motor carrier to recover charges allegedly due, which is defended on the

ground that those charges are unreasonable, the court must stay its hand and refer the "reasonableness" question to the Interstate Commerce Commission.

2. Whether, following the post-payment audit of transportation bills, the Comptroller General may recoup overpayments resulting from unreasonable charges by following the procedures set forth in Section 322 of the Transportation Act of 1940.

STATUTES INVOLVED

Section 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. 66, and relevant portions of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*, are set forth in the Appendix, *infra*, pp. 15–19.

STATEMENT

This action was brought by petitioner, a motor carrier, against the United States under the Tucker Act, 24 Stat. 505, as amended, 28 U. S. C. 1346 (a) (2), to recover certain sums allegedly due it in connection with the transportation of government property. The Government defended on the ground that the charges sought to be collected were unreasonable. The court below directed the District Court to refer the question of reasonableness to the Interstate Commerce Commission for determination. The relevant facts, which are undisputed, may be summarized as follows:

On or about May 29, 1952, petitioner transported four shipments on Government bills of lading from Poughkeepsie, New York to Bellbluff, Virginia (J. A.

3a-4a). Thereafter, it billed the Government for this transportation on the basis of rates which it then had on file with the Interstate Commerce Commission. These rates included a surcharge which was added to the regular rates assessed on all shipments carried to, from, through, or between points in the State of New York (J. A. 4a). The ostensible purpose of the surcharge was to recoup the cost to motor carriers of a ton-mile truck tax levied by New York for the privilege of operating motor vehicles on its highways.

As required by Section 322 of the Transportation Act of 1940, *infra*, p. 15, petitioner's bills were paid by the Government as rendered, without first being audited by the General Accounting Office (J. A. 4a). Upon the post-payment audit contemplated by Section 322, however, the General Accounting Office disallowed that portion of the payments which represented the surcharge. The basis of this disallowance was that on July 20, 1953, following an investigation which had been initiated in 1951, the Interstate Commerce Commission had determined the surcharge to be unjust and unreasonable, and had ordered petitioner and other motor carriers to cancel that portion of their filed rates which reflected it. *Surcharges, New York State*, 62 M. C. C. 117.[1]

[1] Petitioner's tariff, including the New York surcharge, was filed on October 8, 1951; its operation was suspended for the maximum period allowed by statute pending inquiry by the Commission, but it went into effect on May 8, 1952 before the Commission's investigation was completed (62 M. C. C. 117).

Under protest, petitioner refunded the disallowed portion of the payments (totaling $18.34) (J. A. 4a). It then instituted this suit to recover the refund (J. A. 3a–6a). A number of other carriers with similar claims were permitted to intervene. Both petitioner and the Government filed motions for summary judgment (J. A. 7a–8a), and the District Court, without opinion, granted petitioner's motion and denied that of the Government (J. A. 9a).

On appeal, the Court of Appeals reversed, holding that the United States could defend against petitioner's claim on the ground that the surcharge was unreasonable. It pointed to the common law right of a shipper by motor carrier to be free from the exaction of an unreasonable rate, and held that the common law remedy for enforcement of this right was expressly preserved by the savings clause in Section 216 (j) of the Interstate Commerce Act (49 U. S. C. 316 (j)). Concluding that it was not clear from the *Surcharges, New York State* case, *supra*, whether the Commission regarded the surcharge as having been unreasonable when the shipments here involved were made, the Court of Appeals remanded to the District Court with instructions to refer that question to the Commission as a matter within its primary jurisdiction (Pet. App. 1a–9a).

ARGUMENT

The Court of Appeals' holding—that the Government was entitled to interpose its defense of unreasonableness and to have that defense referred to the Interstate Commerce Commission as a matter within

its primary jurisdiction—conforms to the decisions of this Court and is clearly correct.

Petitioner's contention that Part II of the Interstate Commerce Act permits a motor carrier to recover charges declared unlawful by the statute itself has been uniformly rejected by every court that has passed upon it. It has also been rejected, on at least nine occasions, by the Interstate Commerce Commission. Furthermore, it cannot be reconciled with *United States* v. *Western Pacific R. Co.*, 352 U. S. 59. Petitioner's alternative contention that Section 322 of the Transportation Act of 1940 does not authorize the Comptroller General to recoup payments resulting from unreasonable charges has been implicitly rejected by this Court and is equally without merit.

1. In urging that it was entitled to recover the surcharge even if it constituted an unreasonable charge at the time the shipments here involved were made, petitioner relies principally on the fact that Part II of the Interstate Commerce Act does not empower the Commission to entertain independent reparations proceedings where a motor carrier is involved. Recognizing, perforce, that Section 216 (d) of that Part in terms imposes a duty on motor carriers to assess "just and reasonable" charges and goes on to provide that, "'every unjust and unreasonable charge * * * is prohibited and declared to be unlawful", petitioner nevertheless reasons from the Commission's lack of authority to award affirmative relief that Part II was intended both (1) to deprive shippers of all effective protection against the exaction of an unlawful charge,

and (2) to enable motor carriers to invoke the jurisdiction of a federal court to recover such a charge.

Petitioner cannot point to anything in the legislative history of Part II to support its effort to ascribe to Congress the anomalous intent of permitting motor carriers to benefit, with judicial assistance, from conduct which the governing statute proscribes. As the courts have recognized, the existence or nonexistence of Commission authority to award reparations does not determine either (1) the Commission's power to entertain "reasonableness" questions which are raised by way of defense in a judicial proceeding instituted by a motor carrier, or (2) the court's duty, in its disposition of that defense, to seek the Commission's determination (if not already made) under the primary-jurisdiction rule enunciated in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. See *e. g.*, *United States* v. *T. I. M. E., Inc.*, 252 F. 2d 178 (C. A. 5), petition for a writ of certiorari pending, No. 68, this Term; *New York & New Brunswick Auto Express Co.* v. *United States*, 126 F. Supp. 215 (C. Cls.); *United States* v. *Garner*, 134 F. Supp. 16 (E. D. N. C.).

These uniform holdings rest on the considerations discussed at length in *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337. In that case, decided in 1944, the full Interstate Commerce Commission undertook "a thorough reexamination" of the numerous prior decisions of its divisions[2] holding

[2] See *e. g.*, *Kingan & Co.* v. *Olson Transportation Co.*, 32 M. C. C. 10; *W. A. Barrows Porcelain Enamel Co.* v. *Cushman M. Delivery*, 11 M. C. C. 365, 367; *Hausman Steel Co.* v. *Sea-*

that the agency has authority to "make an administrative determination of the lawfulness of rates charged on past shipments" for the benefit of shippers, carriers, and the courts which must resolve their disputes. On the basis of that re-examination, the Commission concluded that those decisions were correct.

As the Commission noted, Part II contains much more than a precatory declaration of a congressional policy that motor carriers—like rail carriers—are to charge just and reasonable rates. The statute confers broad powers on the Commission to insure that the statutory mandate is carried out. For example, Section 204 (e), which has no precise counterpart in Part I, provides that the Commission may investigate, either upon complaint or its own initiative, whether there has been a violation of any requirements of the statute. If the investigation discloses a failure of compliance, the Commission is to issue an appropriate order to compel the motor carrier to comply.

Additionally, Congress expressly preserved in Section 216 (j) all remedies or rights of action "not inconsistent" with the other provisions of the Act. At common law, "where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same

board Freight Lines, Inc., 32 M. C. C. 31; *Dixie Mercerizing Co.* v. *ET and WNC Motor Transp. Co.*, 21 M. C. C. 491, affirmed on reconsideration, 41 M. C. C. 355; *Koppers Co.* v. *Langer Transport Corp.*, 12 M. C. C. 741; *Hill-Clarke Machinery Co.* v. *Webber Cartage Line, Inc.*, 26 M. C. C. 144; *Patten Blinn Lbr. Co.* v. *Southern Arizona Freight Lines*, 31 M. C. C. 716.

is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge". *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436. As the Commission pointed out, there is nothing inconsistent between the survival of this common law remedy and the provisions of Part II, provided that, in the interest of uniformity, the issue of reasonableness is resolved in the first instance by the Commission. Indeed, Section 216 (d) represents a codification, for the purpose of federal regulation, of the common law rule.[3]

This analysis is supported by *United States* v. *Western Pacific R. Co.*, 352 U. S. 59. Indeed, under this Court's holding in that case, the reference ordered by the court below (and by the Fifth Circuit in *United States* v. *T. I. M. E., Inc., supra*) would have been mandatory even if the shipper's common law

[3] *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, discussed by petitioner (Pet. 13–15), is not to the contrary. It is true that "the Court said the case should be dismissed, but preoccupation was with the necessity for prior administrative determination, not with whether there was jurisdiction in the sense of power to hold the case until there had been a Commission determination". (Frankfurter, J., dissenting in *United States* v. *I. C. C.*, 337 U. S. 426, 464).

The language in *United States* v. *I. C. C.*, quoted by petitioner (Pet. 15), similarly is inapposite. It well may be that a shipper cannot file a proceeding in a district court under Section 9 of the Interstate Commerce Act, 49 U. S. C. 9, where his claim is one of unreasonableness necessitating the exercise of the Commission's primary jurisdiction. But that hardly has any bearing upon the shipper's right, in a suit brought by the carrier, to interpose a defense of unreasonableness and to have that defense referred to the Commission. *United States* v. *Western Pacific*, discussed *infra*, dispels all doubt on that score.

remedy had not survived the enactment of Part II of the Interstate Commerce Act.

In *Western Pacific,* three rail carriers sued the United States under the Tucker Act to recover charges allegedly due them for the transportation of containers filled with napalm gel. These charges had been computed at the rate specified for "incendiary bombs". The Government defended on the ground that, as a matter of tariff construction, the lower rate specified for gasoline in steel drums applied, and, alternatively, that if the higher rate governed, it was unreasonable as applied. Granting summary judgment to the carriers, the Court of Claims resolved the tariff construction question adversely to the Government and concluded that a reference to the Commission of the issue of reasonableness was barred because the two-year limitation on the Government's right to seek affirmative relief from that body had expired.

In reversing, this Court held that the absence of authority in the Commission to award affirmative relief to the Government did not abrogate the Government's right to interpose the defense of unreasonableness or affect the duty of the court to refer to the Commission the administrative question raised by that defense [352 U. S. at 71–74]:

> We may assume, without deciding, that the Government would have been barred by § 16 (3) from filing an affirmative suit before the Commission to recover overcharges from a carrier. Nevertheless we do not think that the statute operates to bar reference to the Com-

mission of questions raised by way of defense in suits which are themselves timely brought. * * *

* * * * *

It is argued that this Court has construed § 16 (3) as "jurisdictional" and that the Commission is therefore barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions come to the Commission by way of referral or in an original suit. Reliance is placed upon *A. J. Phillips Co.* v. *Grand Trunk R. Co.*, 236 U. S. 662; *William Danzer & Co.* v. *Gulf & S. I. R. Co.*, 268 U. S. 633; *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356. But these cases all dealt with affirmative claims for the recovery of transportation charges, *and not with referrals incident to suits which were originally brought in time.* The teaching of the *Midstate* case, for instance, is that the running of the statute destroys the *right* to affirmative recovery as well as the remedy, so that the period of limitations cannot be waived by the parties. *But here the Government is not asserting a right to affirmative recovery. It is seeking only to have adjudicated questions raised by way of defense.* It is therefore irrelevant whether the statute of limitations is "jurisdictional" or not; the question would still remain whether Congress intended it to apply to referrals as well as to affirmative suits. * * *

* * * * *

We hold, therefore, that the limitation of § 16 (3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's

primary jurisdiction, as were these questions relating to the applicable tariff. [Emphasis added.]

Petitioner's reliance on *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, is misplaced. As observed by the court below (Pet. App. 8a), by the Fifth Circuit in *United States* v. *T. I. M. E., Inc., supra*, 252 F. 2d at 181, and by the Interstate Commerce Commission in a recent decision reaffirming *Bell Potato Chip*,[1] the issue in the *Montana-Dakota* case was quite different from that presented here. And nothing in that decision supports petitioner's theory that, notwithstanding the teachings of the later *Western Pacific* case, a reference to the Commission is precluded by the fact that the Commission could not award affirmative relief to the Government were an independent proceeding brought for that purpose.

Montana-Dakota was a suit in a federal court by one public utility electric company against another to recover past exactions of allegedly unreasonable charges. Since there was no diversity of citizenship between the parties, and thus jurisdiction in the district court would have been lacking had the suit been brought to enforce an asserted common law right, the plaintiff, of necessity, alleged that a right of action had been created by the Federal Power Act itself. This Court held that the declaration in that Act that unreasonable rates are unlawful did not create an enforceable right to recover unreasonable charges.

[1] *United States* v. *Davidson Transfer & Storage Co., Inc.*, 302 I. C. C. 87.

On the basis of this holding, the Court determined that the plaintiff had not stated a cause of action cognizable in a federal court, and that, therefore, there was no occasion for a reference to the Federal Power Commission. At the same time, the Court noted its prior holdings that where a federally cognizable cause of action has been stated the district court must stay its hand pending reference of subsidiary administrative questions to the appropriate administrative tribunal. See *Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422.

In the instant case, the District Court had a federally cognizable cause of action before it to which the "reasonableness" question raised by the Government's defense was subsidiary. Moreover, even if this action had been instituted by the Government to recover an unreasonable motor carrier charge, *Montana-Dakota* would not have barred a reference. Since the jurisdiction of the District Court could have been invoked under 28 U. S. C. 1345, the Government would not have been required to rely on Part II of the Interstate Commerce Act as the source of a federally cognizable cause of action. Rather, it could have invoked its common law remedy, which, as observed above, has been preserved.[5]

[5] Petitioner's argument (Pet. 14) that constitutional considerations would bar the Government from invoking its common law remedy is footless. In the first place, contrary to its apparent belief, the rights of the United States in its contracts for goods and services are governed by general common law principles as interpreted by the federal courts, not

2. There is no merit to petitioner's contention that the General Accounting Office lacks authority to recoup payments to common carriers on the basis that they reflected unreasonable charges. Section 322 of the Transportation Act of 1940, *infra*, p. 15, explicitly reserves to the United States the right to deduct the amount of any overpayment to any carrier from any amount subsequently found to be due the carrier.

To avoid the effect of Section 322, petitioner argues that the term "overpayment" in that Section should be deemed synonymous with the term "overcharge", which is defined in Section 204a (5) of the Interstate Commerce Act (49 U. S. C. 304a (5)), *infra*, p. 16, as an amount in excess of the filed rate. There is nothing whatever in the legislative history of Section 322 to support this suggestion. Moreover, the definition of "overcharge" in Section 204a is in terms limited to matters arising under that Section.

Finally, petitioner's contention ignores the basic purpose of Section 322. As this Court stated in

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by the law of any particular state. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *United States* v. *Allegheny County*, 322 U. S. 174; *United States* v. *Standard Oil Co.*, 332 U. S. 301. Cf. *Bank of America* v. *Parnell*, 352 U. S. 29. Secondly, the existence of a state common law remedy for tortious exaction of unreasonable charges for interstate carriage of goods is no more "regulation" of interstate commerce than is the existence of a state remedy against an interstate motor carrier who tortiously runs down a pedestrian. State remedies which affect interstate commerce are invalid only where they conflict with federal regulation or substantially burden interstate commerce. Cf. *Collins* v. *American Buslines, Inc.*, 350 U. S. 528. Here, of course, no conflict is possible since the issue of reasonableness is to be resolved by the Interstate Commerce Commission.

United States v. *New York, New Haven & Hartford R. Co.*, 355 U. S. 253, Section 322 conferred the benefit of prompt payment upon the carrier, but preserved all of the Government's rights to protect the public treasury against unlawful payments to contractual claimants. There can be no question that, prior to 1940, the Comptroller General could have withheld payment of a transportation bill in circumstances where he concluded that the charges encompassed in that bill violated the Interstate Commerce Act's prohibition against unjust and unreasonable rates.[6] See also *United States* v. *Western Pacific R. Co., supra*, 352 U. S. at 74.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[6] It can hardly be contended that the Comptroller General acts arbitrarily when the disallowances of the charges are based upon determinations of the Interstate Commerce Commission.

APPENDIX

1. Section 322 of the Transportation Act of 1940, September 18, 1940, c. 722, 54 Stat. 955, 49 U. S. C. 66, provides:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

2. The relevant provisions of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, are as follows:

GENERAL DUTIES AND POWERS OF THE COMMISSION

Sec. 204. [49 U. S. C. 304]

(a) It shall be the duty of the Commission—

* * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

* * * * *

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may in-

vestigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

* * * * * *

ACTIONS FOR RECOVERY OF CHARGES; LIMITATION OF ACTIONS

Sec. 204a. (5)—[49 U. S. C. 304a (5)]

The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

* * * * * *

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

Sec. 216. [49 U. S. C. 316]

* * * * * *

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering

property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable

prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common

carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatsoever.

* * * * *

(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

U. S. GOVERNMENT PRINTING OFFICE: 1938